real-time IDLC validation; and gives CLECs a feature that allows them to know when a hot cut is complete and to port a number immediately.[285]

In the face of these improvements to a process that was already sufficient, no credible claim can be made that the hot cut is a source of impairment. The fact of the matter is that SBC's batch hot-cut process meets even the key criteria that AT&T lays out in its comments for a satisfactory process.[286] For one thing, SBC's batch hot-cut rates have been set pursuant to TELRIC. Moreover, as AT&T requests, loops served by IDLC are eligible to be included in the batch process. And, although SBC's process does not include CLEC-to-CLEC migrations, neither AT&T (nor MCI, which also raises this issue[287]) provides any evidence that such migrations will involve the kinds of large "batchable" volumes that warrant a batch process. A batch process was developed because of the purported need to manage the migration of millions of existing UNE-P customers to switch-based CLEC service. There is no need for such a process to manage routine CLEC-to-CLEC migrations.

Nor is there any need for third-party testing of SBC's batch hot-cut process. SBC's basic processes have already been subject to (and passed) rigorous testing during the section 271 proceedings, and the batch process is an improvement on those processes. Because SBC's basic processes already are sufficient, an additional option that represents an improvement on those processes hardly requires the expense of advance, third-party testing. Instead, proposals for third-party testing are just excuses for CLECs that want to perpetuate the UNE-P for as long as possible. Those CLECs not only fail to demonstrate any need for third party testing, but also

---

[285] *See id.* at 58-59.

[286] *See* AT&T at 171-73.

[287] *See* MCI at 59-60.

ignore the considerable expense of the tests they propose. To conduct those tests, SBC would have to perform thousands of UNE-P conversions, and it would have to do so without migrating a single customer off the UNE-P. There is no reason for the Commission to further delay what has been far too long in coming: the migration of customers off the UNE-P. The delay tactics of CLECs that seek third-party testing of batch processes should be rejected.

That said, SBC does agree with those that argue that this Commission should adopt appropriate standards to govern a batch hot-cut process and that the states should be prevented from adding to or altering those guidelines. As SBC explained in its comments,[288] it is imperative that this Commission, not the individual states, establish any requirements of a sufficient batch hot-cut process. Otherwise, SBC will be subject to conflicting and potentially inconsistent state requirements that will render its processes less efficient and more expensive. No one – neither ILECs nor CLECs – would benefit from such a result.

Finally, and in all events, even if, contrary to all the evidence, there were substance to these complaints about hot cuts (or any other CLEC operational concern), this Commission would be duty-bound to adopt the kind of targeted remedies designed to correct those specific problems where they exist, instead of using them as an excuse to justify imposing all the social costs of unbundling. As Chairman Powell explained at the time of the *Triennial Review Order*, it makes little sense to impose the costs of unbundling on consumers when "there are other, more direct methods of ensuring that the hot cut process is working that fall short of the extraordinary remedy of unbundling the switch."[289] The D.C. Circuit confirmed the correctness of that insight in *USTA II*, where it identified certain tailored alternatives and explained that "[c]onsidering such

[288] *See* SBC at 59.

[289] *Triennial Review Order*, Separate Statement of Chairman Powell at 5.

. . . alternatives is essential in light of our admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling."[290] The court thus held that it is irrational to impose the costs of unbundling where, as here, an alternative remedy can eliminate or ameliorate the alleged impediment to competitive provisioning.[291] In the *Triennial Review Order*, the Commission identified one such narrowly tailored alternative (rolling hot cuts), but then proceeded to ignore that alternative, opting instead for a nationwide finding of impairment. Although the record clearly establishes that no impairment finding could now be made, particularly given the development of intermodal competition and batch processes for intramodal competition, the Commission would be duty-bound to consider such alternatives in the unlikely event it found (against all evidence) that hot cuts are a potential source of impairment.

## III. THE COMMISSION CANNOT LAWFULLY REINSTITUTE LINE SHARING OR THE UNBUNDLING OF HYBRID-LOOP FACILITIES

As the Commission reported to Congress just last month, competition in the market for broadband services is thriving. Subscribership to high-speed lines and to advanced services roughly tripled between June 2001 and December 2003. Facilities-based competitors are investing billions of dollars upgrading and expanding their cable, wireless, and fiber networks, such that more than 90% of U.S. residences have access to broadband services. Consumers have been the direct beneficiaries of the resulting intermodal competition, as they are paying less each month for ever-increasing amounts of bandwidth. As the availability of inexpensive bandwidth has grown, bandwidth-intensive applications have emerged, fanning consumer demand for broadband and setting off a virtuous cycle that is revolutionizing the marketplace. This transformation, in Chairman Powell's words, is "unstoppable."

---

[290] *USTA II*, 359 F.3d at 570.

[291] *Id.* at 571.

Virtually alone among commenters,[292] Covad nevertheless asks the Commission to reverse its reasoned decision in the *Triennial Review Order* to eliminate line sharing and to limit unbundling obligations for hybrid copper-fiber loops. That the Commission cannot legally do. As the *USTA I* and *USTA II* decisions each make clear, the substantial intermodal competition that characterizes the market for broadband services forecloses any finding that competitors are impaired without access to incumbent LEC facilities. Indeed, before the D.C. Circuit, the Commission vigorously defended its decisions not to mandate either line sharing or unbundled access to the broadband capabilities of hybrid loops. The court unanimously affirmed the Commission's holdings in *USTA II*, and the Supreme Court recently denied petitions for certiorari raising the same tired arguments that the CLECs have put forward here. Because the Commission's treatment of broadband facilities in the *Triennial Review Order* was not just reasonable but legally required, and because nothing has changed in the 20 months since the Commission adopted the *Triennial Review Order* that could call its legal and factual determinations into question, the Commission must reject Covad's requests to revisit these settled issues.

### A. Competition Is Not Impaired Without Unbundled Access to the HFPL

In the *Triennial Review Order*, the Commission reviewed the evidence of broadband deployment, including the Commission's finding in its December 2002 *High-Speed Services Report* that cable modem service constitutes 57% of all high speed lines, and found that the costs of line sharing outweigh any benefits from unbundling.[293] Since then, cable has maintained its

---

[292] EarthLink and ALTS also address broadband issues, but, for the most part, they raise no arguments that are not also raised by Covad. As a result, and because Covad addresses these arguments in more detail, SBC here focuses only on the claims raised by Covad.

[293] *See Triennial Review Order* ¶ 263.

lead in the market. As the Commission told Congress just last month, the cable incumbents have "maintained the course" identified in prior Commission reports, such that, as of December 2003, they accounted for approximately 58% of high-speed lines.[294] In addition, the existence of other broadband platforms – including wireless (unlicensed and licensed), broadband-over-power-lines, and satellite – ensure that, even as cable solidifies its lead in the marketplace, broadband will continue to be offered over a "variety of technologies."[295] Given this significant deployment of alternative, intermodal facilities, carriers cannot establish that they are impaired without access to unbundled line-shared loops.

Contrary to Covad's contention, the *USTA II* court did not leave the Commission with the option of reversing its position and reinstating line sharing.[296] In the *Triennial Review Order*, this Commission found that carriers are not impaired in their ability to compete in the market for broadband services without unbundled access to the high-frequency portion of a copper loop.[297] The court did not question this determination. Rather, the court found no need to reach that issue because the Commission's decision to eliminate mandatory line sharing was reasonable *even if* carriers would be impaired in its absence.[298] The Commission could not reinstitute unbundled line sharing without reversing both positions – and finding that, notwithstanding its prior determinations to the contrary, carriers are impaired without mandatory line sharing *and* that the

---

[294] *Fourth Report to Congress* at 29. Cable's share of "advanced services" lines – defined as lines providing at least 200 kbps in each direction – is even more pronounced, reaching more than 75% as of December of last year. *See id.* at 16, Chart 2.

[295] *Id.* at 14, 18-23.

[296] *See* Covad at 56-57.

[297] *See Triennial Review Order* ¶ 259.

[298] *See USTA II*, 359 F.3d at 585 ("We find that even if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.").

benefits of line sharing outweigh its costs. There is no basis for such an abrupt reversal of course.

Indeed, in affirming the Commission's decision, the *USTA II* court stressed that it had "read the Commission as concluding that, at least in the future, line sharing is not essential to maintain robust competition in [the broadband] market."[299] As a result, the Commission could not reverse course without finding, on the basis of "very strong record evidence,"[300] that there would not be robust broadband competition without line sharing. But if the intermodal competition from cable service providers was robust at the time of the *Triennial Review Order*, it is impossible to see how the competition provided by cable would be any less robust today, where cable has maintained its dominant position, residential broadband subscribership is growing at a rate of more than 1.5 million new customers a quarter,[301] and there is a "proliferation of new advanced telecommunications networks and services."[302]

In the face of all of this, Covad offers three reasons in support of its claimed entitlement to line sharing, none of which withstands even cursory analysis. First, Covad invites the Commission to disregard the market dominance of cable modem service on the grounds that the competition between and cable and DSL is not real. According to Covad, "there is, at best, a duopoly market for broadband," and "duopoly conditions are insufficient to produce competitive outcomes."[303] The D.C. Circuit rejected this exact argument in *USTA II*, stressing that "intermodal competition in broadband, particularly from cable companies, means that, even if

---

[299] *Id.*

[300] *Id* at 582.

[301] *See* R. Bilotti, *et al.*, Morgan Stanley, *Broadband Update* at 11, Exh. 7 (July 8, 2004).

[302] *Fourth Report to Congress* at 8.

[303] Covad at 27, 28.

CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources."[304] Moreover, actual marketplace evidence, which this Commission has declared to be "the most persuasive and useful kind of evidence," *Triennial Review Order* ¶ 93, continues to establish that DSL and cable modem service providers compete fiercely against one another. Unsurprisingly, consumers have reaped the benefits of this competition. Indeed, in the months after the Commission's decision to eliminate line sharing in the *Triennial Review Order*, each of the Bell companies cut their national DSL prices while increasing available speeds.[305] Cable providers responded in kind with new promotions, targeted price reductions, and increased speeds.[306] These price wars, together with advertising that directly attacks the other medium,[307] directly refute Covad's claim (at 30) that cable and DSL providers are not competing head on.

Covad next contends that there is no intermodal competition in the small business market, and that Bell companies are the only providers of broadband services to this segment.[308] But the evidence is again to the contrary. The cable companies have all announced that they can serve most small business customers through their existing network facilities, and they have been aggressively and successfully pursuing that market segment.[309] By their own admission, cable companies are offering service to business customers in at least 90 MSAs.[310] Two recent studies

---

[304] *USTA II*, 359 F.3d at 580; *see id.* at 585 ("intermodal competition from cable ensures the persistence of substantial competition in broadband").

[305] *See* Fact Report at A-4 & A-6, Table 4.

[306] *See id.*

[307] *See id.* at A-7.

[308] *See* Covad at 27.

[309] *See* Fact Report at A-3.

[310] *See id.* at III-36.

have concluded that the cable modem subscribership rates for small businesses of every size *exceed* the rates for DSL and traditional T-1 subscribership.[311] And, with respect to the (unsupported) assertion that cable networks do not generally pass business locations, nearly 60% of small and medium-sized businesses are located within a few hundred feet of existing networks, and roughly a quarter already have a cable drop.[312]

Finally, Covad complains that it cannot compete using intermodal alternatives because they are either unavailable (cable) or inconsistent with Covad's business plan (wireless, satellite). But Covad's comments reflect a fundamental misunderstanding of the 1996 Act and the section 251(d) impairment inquiry. As the D.C. Circuit explained in *USTA I*, Covad's desire for or access to particular facilities is irrelevant, as the Act was designed to promote *competition*, not to subsidize the business plan of any particular competitor.[313] In fact, the Commission subsequently (and correctly) rejected a business plan or carrier-specific inquiry in the *Triennial Review Order*,[314] and Covad has not even tried to explain why the Commission should reverse itself.

Thriving broadband competition – involving services that are "comparable in cost, quality, and maturity to incumbent LEC services"[315] – is enough, standing alone, to rebut any assertion that carriers are impaired without access to mandatory line sharing. But as the Commission recognized in the *Triennial Review Order*, and as the D.C. Circuit confirmed in

---

[311] *See id.* at A-3-4.

[312] *See id.* at III-37.

[313] *See USTA I*, 290 F.3d at 429.

[314] *See Triennial Review Order* ¶ 115 ("[W]e cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired.").

[315] *Id.* ¶ 97.

*USTA II*, numerous other factors operate either to alleviate or to outweigh any claim of impairment. First and foremost, as the Commission has held, the availability of unbundled access to stand-alone loops ensures that CLECs can offer DSL service to any customer connected to an incumbent LEC legacy network.[316] CLECs can provide broadband over a dedicated unbundled loop or as part of a voice and data bundle in partnership with a voice provider. Covad has touted both options to the investing public, highlighting its line splitting arrangements with AT&T and other voice providers while recently unveiling a new "dedicated-loop . . . ADSL service[]" that it describes as "ideal for customers who rely on other modes of voice communication such as Voice over Internet Protocol . . . and cell phone service."[317] Covad has also emphasized that it earns more than 60% of its revenues from dedicated-line service that it provides directly to businesses.[318]

In the *Triennial Review Order*, moreover, the Commission recognized that "there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services," such that "the increased operational and economic costs of a stand-alone loop . . . are offset by the increased revenue opportunities

---

[316] *See id.* ¶ 263 ("[g]iven that the whole loop is available, on an unbundled basis, we find that the costs of unbundling the HFPL outweigh the benefits").

[317] Covad Press Release, *Covad Launches Dedicated-Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004), *at* http://www.covad.com/companyinfo/pressroom/pr_2004/070604_news.shtml.

[318] *See* Covad Press Release, *FCC Grandfathers Covad Line-Sharing Customers Indefinitely* (Aug. 22, 2003) ("Covad's business customers using dedicated lines account for about 60 percent of the company's revenues"), *at* http://www.covad.com/companyinfo/pressroom/pr_2003/082203_press.shmtl; Charles Hoffman, President/CEO, Covad, Q2 2004 Covad Communications Earnings Conference Call – Final, FD (Fair Disclosure) Wire, Transcript 072704an.718, at 3 (July 27, 2004) ("It's important to remember that 68% of Covad's current revenue comes from business customers.").

afforded by the whole loop."[319] That is even more true today. Ignoring the Commission's actual statement, Covad contends that the Commission should reinstate mandatory line sharing because it wrongly predicted that carriers "would be able to compete by providing video services over the copper loop."[320] But the *Triennial Review Order* did not purport to eliminate line sharing solely because of revenue opportunities associated with video services. Rather, the Commission emphasized the alternative sources of revenue above and beyond DSL service that are available to any carrier purchasing a stand-alone loop,[321] and Covad says nothing to call that conclusion into question.[322]

In particular, the ability to offer VoIP, together with an array of other value-added broadband applications, reveals that unbundled line sharing serves to distort and suppress, rather than enhance, competition. VoIP competes directly with analog voice service, and it is both marketed and purchased as a POTS line replacement. Covad readily admits that its VoIP

---

[319] *Triennial Review Order* ¶ 258.

[320] Covad at 44.

[321] Nor is this the only instance in which Covad misrepresents this Commission's discussion of line sharing in the *Triennial Review Order*. Covad manufactures "five reasons" for which this Commission allegedly eliminated line sharing, and then purports to address each straw man in turn. *Id.* at 43. For example, Covad contends that "the Commission had anticipated that data CLECs such as Covad could easily team up with UNE-P providers and jointly offer consumers a bundle of voice and data services. Line splitting was to make line sharing unnecessary." *Id.* Yet the Commission did not even mention, let alone rely on the availability of the UNE-P in explaining why carriers were not impaired without mandatory line sharing. Nor did the Commission base its impairment analysis on the presumption "that ILECs and CLECs would enter into commercial contracts to replace the line sharing regulatory framework with contractual arrangements," as Covad falsely asserts. *Id.* at 45. Rather, having *already determined* that CLECs are not impaired without mandatory line sharing, the Commission established a transition mechanism with default pricing and encouraged negotiations over long-term arrangements. Contractual arrangements were irrelevant to the impairment analysis itself.

[322] In fact, Covad's own comments, which spend dozens of pages emphasizing the potential for VoIP services to revolutionize the marketplace, testify to the scope of these revenue opportunities.

offering is designed to replace traditional POTS.[323] As SBC has already explained – and as Covad's comments unwittingly confirm – VoIP is thus fundamentally incompatible with the whole premise of line sharing, which was that the provision of voice service required an entirely separate infrastructure, which should not be forced on those seeking to provide DSL service. But it is not just that the advent of VoIP obviates any need for lines sharing, if there ever was one; it actually renders line sharing, as defined by the Commission, a *non sequitur*. Under line sharing, the incumbent LEC provides voice service over the low frequency portion of the loop while another carrier provides data over the high frequency portion. If the incumbent LEC is eliminated as the traditional voice provider, there can be no line sharing by definition.

Nor is Covad's proposed $5/month solution – supposedly while it works out the kinks in its VoIP offering[324] – remotely defensible. Under that scheme, no less than under the scheme the Commission previously imposed and the D.C. Circuit vacated, "competitive LECs purchasing only the HFPL [would] have an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs."[325] A CLEC providing traditional circuit switched telephony would incur the full costs of the unbundled loop, while Covad could offer competitive voice service for a fraction of the price. Such regulation would necessarily skew incentives and subsidize one category of potential voice competitors at the expense of others.

Indeed, Covad has effectively asked the Commission to subsidize its VoIP business plan to the detriment of all other VoIP competitors. Covad contends that these regulatory subsidies

---

[323] *See id.* at 37 ("Covad's VoIP services offer a complete, high quality alternative to traditional telephony services – with all the additional features and enhancements that VoIP makes possible").

[324] *See id.* at 50-51, 60-64.

[325] *Triennial Review Order* ¶ 260.

are necessary because "without line sharing, there will simply be no one left around to enter the residential voice market with a facilities-based VoIP product to compete with the Bell companies' legacy POTS services."[326] But that ignores cable broadband providers, which already offer VoIP over their own facilities to more than 5 million households and which have plans to increase that number to 40 million homes by the end of 2005.[327] It also ignores AT&T, which sells VoIP service in more than 120 markets, as well as Vonage and other IP-based providers. All of these competitors, as well as the Bell companies themselves, have been investing in VoIP facilities and technology without the benefit of the regulatory subsidies that Covad seeks to reinstitute.[328] Elemental principles of economics and regulation dictate that there is no reason to give Covad an artificial regulatory advantage in this race to deploy new technology, and every reason not to.

### B. Competition Is Not Impaired Without Unbundled Access to the Broadband Capabilities of Hybrid-Fiber Loops

The vibrant competition in the broadband services market, together with the emergence of broadband applications such as VoIP that dramatically increase the revenues available to broadband providers, also precludes any finding that carriers are impaired without access to the broadband capabilities of the fiber portion of hybrid loops. While the Commission found minimal impairment in the *Triennial Review Order* – impairment that was outweighed by disincentives to CLEC investment that would flow from unbundling and mitigated by the

---

[326] Covad at 54.

[327] *See* Fact Report at I-5.

[328] In its comments, which read like marketing materials, Covad criticizes the services offered by these VoIP competitors and claims that line sharing is necessary because Covad wants to offer different features and functionalities. Covad should direct its attention towards convincing customers and investors that its VoIP offerings are superior rather than seeking the reinstitution of irrational regulatory subsidies.

availability of other UNEs as well as intermodal competition – even that limited finding can no longer be justified. Under *USTA II*, the Commission is legally obligated to consider the availability of alternative facilities, including alternatives offered by the incumbent LEC. Because unbundled copper loop and subloop offerings provide competitors a meaningful opportunity to compete, CLECs do not face impairment without access to the broadband capabilities of the hybrid fiber loop.

But even if the Commission were again to find limited impairment, the Commission cannot lawfully reverse its determination that competing considerations far outweigh any such impairment. The same considerations on which the Commission relied in the *Triennial Review Order* remain present today. If anything, they are even weightier today.

**1.** In *USTA II*, the D.C. Circuit emphasized that the Commission must consider the availability of alternative facilities from any source – including the incumbent LEC – in assessing impairment.[329] While the court was specifically focused on tariffed special access services, the logic underlying this conclusion – *i.e.*, that the analysis turns on whether carriers can compete without access to a particular UNE – compels the Commission to consider the availability of other UNEs as well.

Once the availability of unbundled copper loops and subloops are added to the inquiry, no carrier can claim impairment without access to the broadband capabilities of fiber feeder plant. For purposes of narrowband voice service, carriers can compete through available access

[329] *See* 359 F.3d at 577 ("We therefore hold that the Commission's impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.").

to either an alternative home-run copper loop or an unbundled virtual voice circuit. Nothing more is needed to offer a competitive voice service.[330]

Nor can carriers demonstrate impairment in their ability to offer broadband services without access to the advanced capabilities of the incumbent LEC fiber feeder plant. Where available, CLECs can purchase a home-run copper loop on an unbundled basis and provide the same bundle of voice and data services that they routinely provide over stand-alone loops. Alternatively, CLECs can serve those customers by purchasing unbundled copper subloops, which has the benefit of decreasing the distance between their DSLAM and the customer premises and thereby allowing CLECs to offer broadband service at increased speeds.[331] Unbundled access to copper subloops also supports the same array of financial opportunities available to CLECs purchasing stand alone loops. If anything, the ability to offer broadband service at greater speeds enables carriers to offer more value-added, bandwidth-intensive applications to the customers, and therefore increases the revenue opportunities.

Moreover, in asking the Commission to reverse itself and to require incumbent LECs to unbundle the broadband capabilities of hybrid loops, Covad is effectively asking the Commission to reverse its decision not to unbundle packet switching capabilities. Covad admits as much, but claims that these facilities should be unbundled both because this advanced services

---

[330] *See Triennial Review Order* ¶¶ 294, 296.

[331] The availability of unbundled copper subloops itself refutes Covad's overheated claim that the Commission's treatment of hybrid fiber facilities "allows the ILECs to exercise monopoly power over an entire class of existing customers who have the historical misfortune to reside at the end of a loop that happens to have fiber in it." Covad at 56. Moreover, as the Commission itself has recognized by virtue of its decisions to afford unbundling relief as ILECs push fiber deeper into the networks, most customers find the prospect of the enhanced broadband capabilities that come with such fiber penetration to reflect their good fortune.

equipment is not "revolutionary" and because it differs from a Class 5 circuit switch.[332] Covad makes no effort, however, to explain how this tautology – a packet and a circuit switch perform different functions – establishes that carriers are impaired in their ability to compete without unbundled access to packet switching. Instead, Covad tries to distinguish between packet switching at a remote terminal and what it calls "true ILEC packet switches."[333] But Covad never explains the salient characteristics of a "true" packet switch, nor does it make any effort to demonstrate why carriers cannot self-deploy the same equipment that it characterizes as non-revolutionary.[334] Covad also fails to explain how broadband competition could be thriving, as this Commission has already concluded, notwithstanding the fact that the packet switching functionality it seeks here is not offered on an unbundled basis.[335]

**2.** Even if the CLECs could establish impairment without access to the broadband capabilities of fiber facilities, this Commission has already determined that any minimal impairment is outweighed by more important considerations.

First, and most fundamentally, the obligation to unbundle the broadband capabilities of hybrid fiber facilities undermines the incentives of incumbent LECs and CLECs alike to invest in the equipment necessary to create those capabilities in the first place. This consideration takes on profound importance today, as ILECs – SBC among them – have undertaken enormous fiber deployment initiatives in express reliance on the Commission's determinations *not* to unbundle

---

[332] *Id.* at 59.

[333] *Id.*

[334] In the *USTA II* proceedings, Covad argued that the costs of this advanced services equipment were negligible.

[335] *See USTA II*, 359 F.3d at 576 (where competition flourishes in the absence of unbundling, "it is hard to see any need for the Commission to impose the costs of mandatory unbundling").

broadband facilities. In the wake of the *Triennial Review Order*, SBC announced a plan to build a new fiber network – reaching *18 million households* – within five years. And, following the Commission's clarification of that order last week – which confirms that the network modification rules do not trump the Commission's conclusion that ILECs need not unbundle packetized facilities – SBC has pledged to accelerate this massive initiative and aims to complete it within three years.[336] If the Commission were to reverse course now and impose mandatory unbundling obligations on next generation facilities, it would not only be fundamentally unfair, but it would also send a message that, even where the Commission has taken steps to promote investment by ILECs, those steps may be reversed, and it would thereby chill incumbent LEC investment in broadband infrastructure across the board.

Equally important, as this Commission recognized in the *Triennial Review Order*, and as the D.C. Circuit emphasized on appeal, any requirement to unbundle the broadband capabilities of hybrid facilities would eviscerate *CLEC* incentives to invest in their own network infrastructure. Indeed, nothing in the massive record that has been assembled by the Commission to date even bears on this issue, much less calls the Commission's prior conclusion into question. In light of this utter failure of requesting carriers to support their case, the Commission cannot lawfully reverse its prior decisions to restrict unbundling of broadband facilities.[337]

---

[336] *See* SBC News Release, *SBC To Rapidly Accelerate Fiber Network Deployment In Wake of Positive FCC Broadband Rulings* (Oct. 14, 2004), *at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427.

[337] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (recognizing legal "presumption . . . against changes in current policy that are not justified by the rulemaking record"); *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004) ("An agency acts arbitrarily and capriciously if it 'reverses its

## IV. THE COMMISSION SHOULD ACT FORCEFULLY TO ENSURE PROMPT AND FAITHFUL IMPLEMENTATION OF ITS RULES

As SBC explained in its opening comments, in order to achieve its primary goal of advancing the development of facilities-based competition, the Commission must take affirmative steps to ensure that its revised unbundling rules are not only implemented quickly but also are protected from misguided state commission efforts to preserve the prior, unlawful unbundling regime. Any doubt about the importance of taking such steps has been dispelled by the comments submitted by the CLECs and state commissions. The CLECs confirm that they intend to do everything they can to delay incorporating the Commission's new rules into their existing interconnection agreements, and many state commissions unabashedly assert their intention to require maximum unbundling under state law, notwithstanding this Commission's and the D.C. Circuit's binding determinations foreclosing that result.

Indeed, the comments make absolutely clear that, unless the Commission takes the affirmative steps that SBC and others have advocated, the Commission's policies regarding the best way to enhance investment and innovation for the benefit of consumers could be entirely frustrated. Specifically, the Commission must do the following:

*First*, the Commission should make explicit that any decision not to require unbundling creates binding national policy by preempting any attempt by a state commission to use state law to impose unbundling obligations that the Commission has found unnecessary.

*Second*, the Commission should grant SBC's and the other BOCs' pending section 271 forbearance petitions, confirming that a decision not to require unbundling under section 251 means that there is no legitimate reason to impose the same social costs of section 251

---

position in the face of a precedent it has not persuasively distinguished.'") (quoting *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999)).

unbundling under section 271. At a minimum, the Commission should make clear that states have no authority to enforce section 271 or to establish rates, terms, or conditions for facilities that the Commission has decided need not be unbundled under section 251.

*Third*, the Commission should make clear that change-of-law provisions in existing interconnection agreements cannot be used to block implementation of the Commission's new unbundling requirements. Any negotiation of new interconnection agreement terms for elimination of unbundling requirements must be done in good faith and in a manner that complies with the time frames established by the Commission for the implementation of those rules. The Commission should make clear that any CLEC that fails, within 30 days, to adopt an amendment reflecting a Commission decision to eliminate a particular unbundling requirement shall presumptively be considered negotiating in bad faith and will be subject to sanctions.

*Fourth*, although there is no need for any transitional rates for existing CLEC customers, if any such rates are adopted, the transition should be very short. And there is certainly no justification for a "transition" that permits CLECs to add *new* UNE customers.

*Fifth*, the Commission should put in place a climate hospitable to commercial negotiations, by confirming that carriers that engage in such negotiations will be permitted to retain the benefit of their bargain and will not be subjected to state commission intervention.

### A. The Commission Should Confirm That States May Not Require the Unbundling of Elements That This Commission Has Determined Need Not Be Unbundled Under Federal Law

The Commission has already recognized that, "[i]n the UNE context, . . . a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule

that struck a different balance would conflict with federal law, thereby warranting preemption."[338] Nevertheless, AT&T and others continue to insist that "[t]he 1996 Act is . . . analogous to the numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them."[339]

That is precisely wrong. The Commission's unbundling rules are a ceiling – they have to be, in order to accomplish the goals reflected in the 1996 Act. By requiring incumbents to share their networks at cost-based rates only when competition would be "impaired" without such access, Congress recognized that genuine competition would come only when competitors had, on one hand, access to those facilities that would be very expensive or inefficient to duplicate and, on the other hand, appropriate incentives to invest in other facilities that are more easily duplicable. As the Supreme Court summarized, if "Congress had wanted to give blanket access to incumbents' networks," it "would simply have said . . . that whatever requested element can be provided must be provided."[340]

But that is not what Congress said. Instead, Congress required the Commission to establish federal regulations that would recognize the need for balance – recognizing that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities," while, at the same time,

---

[338] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004) ("FCC *USTA II* Br.") (citations omitted); *see also* Brief for the Federal Respondents in Opposition at 21-22, *NARUC v. FCC*, Nos. 04-12, 04-15 & 04-18 (U.S. filed Sept. 1, 2004) ("[S]tate laws or rulings inconsistent with the FCC's unbundling regulations would be inconsistent with the congressionally authorized 'implementation of the requirements of [Section 251],' 47 U.S.C. 251(d)(3)(C), and hence preempted.") (alteration in original).

[339] AT&T at 188; *see also* Sprint at 64 (referring to Commission's unbundling obligation as "mandatory minimum").

[340] *Iowa Utils. Bd.*, 525 U.S. at 390.

acknowledging that "a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful."[341]

The preemptive scope of the 1996 Act is, therefore, different from other federal laws, because achieving (and maintaining) the appropriate balance is absolutely essential to promote the very purposes of the legislation. Contrary to AT&T's contention, this statute is thus completely different from federal environmental laws, for example, that establish minimum federal standards for regulating the treatment, storage, and disposal of waste, while expressly providing that nothing under federal law "'shall be construed to prohibit any State . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations.'"[342]

The Commission's balancing of interests in establishing the proper amount of unbundling preempts any state decision that strikes a different balance. This is clear from *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), where the Department of Transportation chose to phase-in an airbag requirement over a period of years because it thought that requiring airbags on all cars immediately would hurt other policy goals, such as lowering costs, overcoming technical

---

[341] *USTA I*, 290 F.3d at 427 (citing *Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part)).

[342] *Old Bridge Chems. Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992) (quoting 42 U.S.C. § 6929). The other cases on which AT&T relies are similarly inapposite. *See, e.g., United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1454, 1455 (6th Cir. 1991) (recognizing the obvious fact that, because the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") expressly provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within the state," 42 U.S.C. § 9614(a), CERCLA "sets only a floor"); *Southern Blasting Servs. v. Wilkes County*, 288 F.3d 584, 591, 592 (4th Cir. 2002) (holding that "a state or locality's imposition of additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law," particularly where regulations of the Bureau of Alcohol, Tobacco, and Firearms provide that "a federal license to import, manufacture, or deal in explosive materials does not exempt a licensee from state and local requirements").

safety problems, encouraging technological development, and winning widespread consumer acceptance. The Supreme Court held that, because a state's legal requirement effectively "required [automobile] manufacturers . . . to install airbags" on all cars immediately, it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed."[343] The critical point, however, was not just that the Department of Transportation had "deliberately imposed" the gradual passive-restraint regulation, but rather that its decision "'embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.'"[344] In precisely the same way, this Commission's decision regarding which network elements to unbundle embodies a policy judgment that competition would best be promoted if incumbent carriers provided their competitors access at cost-based rates only to certain network elements *and not others*.

More unbundling is *not* better. Instead, as Congress determined, the Commission must strike just the right balance between too little unbundling (in which competition is harmed because competitors are unable to duplicate certain services or facilities) and too much (in which competition is harmed because neither incumbents nor competitors have sufficient incentives to invest and innovate). Once the appropriate balance is struck, however, it would undermine this crucial federal policy if state commissions could ignore the Commission's authoritative policy and instead mandate unbundling on nothing more than the theory that what is good for competitors is good for competition. The Commission's decision not to unbundle certain elements thus "takes on the character of a ruling that no such regulation is appropriate or

[343] 529 U.S. at 881.

[344] *Id.* (quoting Brief for United States as *Amicus Curiae* at 25) (emphasis added).

approved pursuant to the policy of the statute," thereby preempting any inconsistent state regulation or requirement.[345]

AT&T argues that these black-letter principles amount to a "field preemption" theory – a theory that is inconsistent with both Congress's and this Commission's repeated expressions to the contrary.[346] This is nonsense. SBC and the other incumbent LECs have never argued that Congress has occupied the field of local telecommunications regulation. Rather, they have argued that, in the specific area of network-element unbundling, the federal regulations reflect a careful balancing of interests that the 1996 Act has assigned exclusively to this Commission to strike, and that balance would be undermined by any state commission decision requiring the unbundling of a network element that this Commission has declined to require.

Contrary to AT&T's claim (at 189), the Fifth Circuit's decision in *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812 (5th Cir. 2000), is entirely consistent with SBC's position. In *Waller Creek*, the question was whether the Texas commission could require Southwestern Bell to combine network elements, even though the FCC's requirement that Southwestern Bell perform this combining had been vacated as unlawful. The Fifth Circuit upheld the Texas commission's requirement because "[n]othing in the [1996] Act forbids such combinations."[347] But that is not the case with respect to whether an incumbent LEC must provide unbundled access to a particular network element. As authoritatively interpreted by the Supreme Court in *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002), the D.C. Circuit in *USTA I*, and the Commission in the *Triennial Review Order*

[345] *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

[346] *See* AT&T at 195.

[347] *Waller Creek*, 221 F.3d at 821.

– all of which post-date the Fifth Circuit's decision in *Waller Creek* in any event – the text, structure, and purpose of the 1996 Act most definitely *do* forbid the mandatory unbundling of any network element that the FCC has found not to satisfy the "impairment" standard under 47 U.S.C. § 251(d)(2).

Moreover, in *Waller Creek*, this Commission had agreed with the Texas commission that requiring incumbents to provide combinations of network elements would be consistent with federal policy. Ultimately, of course, the Supreme Court agreed as well.[348] That is a far cry from the situation here, where both this Commission and the D.C. Circuit have recognized that the balance required by the statute and reflected in current federal regulations would be undermined by any requirement to unbundle network elements for which no impairment has been found.

Nothing in the various savings clauses prevents this Commission from preventing state commissions from applying state law to force the unbundling of network elements that this Commission has declined to unbundle. None of the saving clauses supports the argument that Congress intended to permit state commissions to issue decisions that are inconsistent with federal law. The Supreme Court has consistently warned against "plac[ing] more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme."[349] And, in *Geier*, the Supreme Court made clear that a savings clause "does not bar the ordinary working of conflict pre-emption

[348] *See Verizon*, 535 U.S. at 535.

[349] *United States v. Locke*, 529 U.S. 89, 105 (2000).

principles," and, therefore, that courts must "'decline[ ] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"[350]

*Section 251(d)(3).* A state law requirement would be preserved under section 251(d)(3) only if it were both "consistent" with federal law and did "not substantially prevent implementation of the requirements of this section and the purposes of this part."[351] By its very terms, this provision does not prevent the Commission's regulations from preempting any state regulation, order, or policy that *is* inconsistent with the "requirements" of section 251, or that "substantially prevent[s] implementation" of section 251 *or* the "purposes" of the Act as a whole. As the Commission has stated, "the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our [unbundling] framework and create disincentives for investment."[352] This Commission has already acknowledged to the D.C. Circuit that "section 251(d)(3) authorizes preemption of state requirements that 'substantially prevent implementation of the requirements' of section 251" and that "any state law that undermines the FCC's implementing rules would 'substantially prevent implementation of the requirements' of section 251. In that circumstance, the Act permits preemption."[353]

AT&T claims that the Commission's regulations cannot possibly have any preemptive effect: "Because § 251(d)(3) limits the Commission's authority to adopt preemptive regulations, the lawfulness of a state measure providing for additional unbundling is measured against the requirements and purposes of § 251 of the *Act,* not those of the *Commission's regulations.*"[354]

---

[350] 529 U.S. at 869, 870 (quoting *Locke*, 529 U.S. at 106).

[351] 47 U.S.C. § 251(d)(3).

[352] *Triennial Review Order* ¶ 196.

[353] FCC *USTA II* Br. at 92.

[354] AT&T at 192.

But the Commission has already flatly rejected this argument. Relying on Congress's reference in section 252(c)(1) to the state commission's obligation to ensure that interconnection agreements "meet the requirements of section 251 of this title, *including the regulations* prescribed by the Commission pursuant to section 251,"[355] the Commission has quite sensibly concluded that "[t]his language leaves no doubt that FCC regulations are 'requirements of section 251.'"[356]

Moreover, section 251 itself requires the Commission to "complete all actions necessary to establish regulations to *implement the requirements of this section.*"[357] Section 251(d)(3), in turn, uses the same words to describe state laws that do not "substantially prevent *implementation of the requirements of this section.*"[358] Assuming that the Commission has done its job correctly, its regulations are the means by which the "requirements of this section" are "implement[ed]," and the Commission must preempt any state law that interferes with that "implementation."

*Section 252(e)(3).* According to AT&T, this section ensures that "a state may exercise its inherent sovereign power to regulate intrastate facilities and services, including the terms of competitive access to local telephone networks."[359] But Congress authorized a state commission to reject an arbitrated interconnection agreement only if it finds that "the requirements of section 251 of this title, *including the regulations prescribed by the [FCC] pursuant to section 251,*"

---

[355] 47 U.S.C. § 252(c)(1) (emphasis added).

[356] FCC *USTA II* Br. at 92.

[357] 47 U.S.C. § 251(d)(1) (emphasis added).

[358] *Id.* § 251(d)(3) (emphasis added).

[359] AT&T at 191.

have not been met.[360] Obviously, when Congress provided in the very next subsection that a state commission may establish or enforce "*other* requirements of State law,"[361] it was referring to matters that fell wholly outside the requirements of section 251 and the regulations prescribed by the Commission. This does not include state-law unbundling obligations. This is immediately clear from the fact that Congress referred to "intrastate telecommunications service quality standards or requirements" as the kinds of "other requirements" it intended – that is, matters that are clearly not covered by section 251. That is why the Commission expressly rejected AT&T's attempt to rely upon section 252(e)(3) to limit the scope of this Commission's preemption authority in the *Triennial Review Order*.[362]

The cases on which AT&T relies for support of a contrary reading are easily distinguished. In *AT&T Communications v. BellSouth Telecommunications, Inc.*, for example, the Fifth Circuit merely paraphrased section 252(e)(3): "Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement."[363] This sentence appears in the middle of a long paragraph summarizing various provisions of the 1996 Act. The actual issue in that case – whether state commissions retained sovereign immunity under the Eleventh Amendment – had nothing to do with section 253 or section 252(e)(3). AT&T also purports to rely on *Puerto Rico Telephone Co. v. Telecommunications Regulatory Board*, 189 F.3d 1 (1st Cir. 1999), where the First Circuit said that section 252(e)(3) represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action"; and *Southwestern Bell Telephone Co. v. Public Utility*

[360] 47 U.S.C. § 252(e)(2)(B) (emphasis added).

[361] *Id.* § 252(e)(3) (emphasis added),

[362] *See Triennial Review Order* ¶ 194.

[363] 238 F.3d 636, 642 (5th Cir. 2001).

*Commission*, 208 F.3d 475 (5th Cir. 2000), where the Fifth Circuit said that the "Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."[364] Again, the scope of section 252(e)(3) was not at issue in either of these cases. The question in both cases was whether federal courts had supplemental jurisdiction to hear complaints that state commissions had violated state law when reviewing interconnection agreements.[365]

*Section 261(c).* Like section 251(d)(3), this provision clearly anticipates the preemption of any state requirement that is "inconsistent with . . . the [FCC's] regulations." Relying on *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), AT&T suggests that the word "inconsistent" is a term of art that applies only where state law literally requires the violation of federal law.[366]

AT&T misreads *Rath Packing*. In that case, the Supreme Court considered whether a California law, which requires packages to state a minimum weight on their labels but does not allow reasonable weight variations resulting from loss of moisture during distribution, was preempted by the federal Fair Packaging and Labeling Act ("FPLA"), 15 U.S.C. §§ 1451-1461, which requires labels to display an accurate weight but allows for such reasonable variations. The Court held that, because enforcement of the California law would require manufacturers to overpack their flour bags to ensure that they would not fall below California's minimum-weight requirement, enforcing the state law "would prevent the accomplishment and execution of the full purposes and objectives of Congress in passing the FPLA. Under the Constitution, that

[364] *See* AT&T at 191 & n.90.

[365] *See Southwestern Bell*, 208 F.3d at 482; *Puerto Rico Tel. Co.*, 189 F.3d at 14-15.

[366] *See* AT&T at 193 n.91.

result is impermissible, and the state law must yield to the federal."[367] Just as the California labeling law prevented the accomplishment of the full purposes of the FPLA, so would a state unbundling requirement that strikes a different balance frustrate the accomplishment of this Commission's goals to provide just the right balance between the costs and benefits of unbundling.

*Section 601(c).* Finally, AT&T seeks to rely on section 601(c)(1) of the 1996 Act, claiming that Congress "included this clause to 'prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws.'"[368] But this "savings" clause adds nothing to the arguments that have already been made. Section 601(c)(1) necessarily points to section 251(d)(3), which allows preemption of state regulations that are inconsistent with the Act and the "implementation" of the requirements of the Act,[369] and to section 261(c), which permits states to impose requirements "as long as [they] are not inconsistent with this part or the [FCC's] regulations to implement this part."[370]

### B. The Commission Should Confirm That States Have No Authority To Enforce Section 271 or To Establish Rates, Terms, or Conditions for Facilities That the Commission Has Decided Need Not Be Unbundled Under Section 251

A number of parties contend that the states are, or at least should be, empowered to establish and enforce the terms and conditions under which the BOCs satisfy any lingering unbundling obligations pursuant to section 271. This focus on purported 271 unbundling obligations is – or should be – a sideshow. For the reasons SBC has already provided, the

---

[367] *Jones*, 430 U.S. at 543 (internal quotation marks omitted).

[368] AT&T at 193 (quoting H.R. Conf. Rep. No. 104-458, at 201 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 215) (alterations in original).

[369] *See* 47 U.S.C. § 251(d)(3).

[370] *Id.* § 261(c).

Commission should immediately grant the pending petitions seeking forbearance from the imposition of unbundling under section 271 for facilities as to which the Commission has not found impairment.[371] Forbearance should be granted because once the Commission has decided that competitors are not impaired without access to facilities for purposes of section 251(d)(2), it makes no sense to impose the social costs of unbundling by mandating unbundling under section 271. Where the Commission has decided that the relevant network element is "[]suitable" for competitive supply,[372] unbundling would impose substantial disincentives to facilities-based investment precisely "where [there is] no reason to think doing so would bring on a significant enhancement of competition."[373] Where the Commission concludes that CLECs are *not* impaired without access to a particular facility, the forbearance requirements set forth in section 10 are necessarily met, and the Commission must forbear from enforcing any lingering unbundling obligations contained within section 271.

In addition to granting those pending petitions, the Commission must also make clear that states have no authority to enforce section 271 and that any attempt by states to establish "just and reasonable" rates for items that must be unbundled under section 271 (but not under section 251) is contrary to the 1996 Act. As BellSouth described in its petition in WC Docket No. 04-245 and SBC explained in its comments and reply comments in that docket, some state commissions, such as the Tennessee Regulatory Authority, have already improperly asserted

---

[371] *See* WC Docket No. 03-235 (SBC's petition for forbearance); *see also* WC Docket No. 04-313 (Verizon's comparable petition); WC Docket No. 03-260 (Qwest's comparable petition); WC Docket No. 04-48 (BellSouth's comparable petition).

[372] *USTA I*, 290 F.3d at 427.

[373] *Id.* at 429.

authority to establish rates under section 271. The Commission should confirm that they have no authority to do so.

Section 271 confers no authority upon the states to regulate the rates, terms, or conditions of the items required by the section 271 competitive checklist. Section 271 states that "*[t]he Commission* shall . . . approv[e] or den[y]" an application and that the "*Commission* may" revoke section 271 authority or take other action if it subsequently determines that the BOC is no longer in compliance with section 271's requirements.[374] Accordingly, as the Commission has properly explained, Congress intended that a single federal agency, not 51 separate state bodies, exercise "*exclusive authority*" over "the section 271 process."[375]

The states' role under section 271 is to consult with the Commission regarding whether the Bell company has entered into one or more interconnection agreements that meet the requirements of the competitive checklist.[376] A straightforward reading of the statutory text thus demonstrates that state commissions have no authority to impose obligations as a condition of compliance with section 271. In the D.C. Circuit's words, Congress "has clearly charged the FCC, and *not the State commissions*," with assessing BOC compliance with section 271.[377]

AT&T is wrong to suggest that section 252 provides state commissions the authority to impose rates, terms, and conditions for facilities that must be made available only to satisfy

---

[374] 47 U.S.C. § 271(d)(3), (6) (emphases added).

[375] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, ¶ 18 (1999) (emphasis added).

[376] *See* 47 U.S.C. § 271(d)(2)(B).

[377] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).